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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 500

William S. Halpern and Louis N. Seltzer, d/b as
BURLINGTON BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WEST JERSEY BROADCASTING COMPANY,
and
JOHN C. GIORDANO,
Receiver of the Assets of Mount Holly-
Burlington Broadcasting Co., Inc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company (hereinafter referred to as "Burlington Broadcasting"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 17, 1965.

OPINION BELOW

The Order of the Court of Appeals is unreported and is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1965. Petitions by the Federal Communications Commission for Rehearing and by Burlington Broadcasting for Rehearing, Or in the Alternative for Rehearing *en banc* were denied by separate Orders of the Court of Appeals on May 28, 1965, and are reproduced herein as Appendices B and C, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals properly exercised its judicial authority to review decisions of the Federal Communications Commission when it —

(1) Denied the Commission's Motion which proposed to issue a decision granting the application of Burlington Broadcasting which had been found fully qualified to be a licensee; and

(2) Directed that new applications be entertained by the Commission; and

(3) Directed the Commission to grant an application for the assignment of the facilities to a Receiver.

STATUTE INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, are set forth in Appendix D, *infra*.

STATEMENT

On November 18, 1958, Burlington Broadcasting filed an application for a new standard broadcast station in Burlington, New Jersey. As the Commission later found, Burlington Broadcasting was fully qualified in all respects (legally, technically and financially) to construct and operate the proposed facility in the public interest.

However, no action was taken on that application. On January 23, 1960, a competing application was filed by Burlington County Broadcasting Company; and on February 26, 1960, a second competing application was filed by John J. Farina. On February 1, 1961, the Commission designated the three applications for hearing in a consolidated proceeding. On June 14, 1963, following an evidentiary hearing and oral argument, the Commission granted the application of Farina.[1]

Thereafter, Burlington Broadcasting took an appeal on the grounds that the Commission erred in its findings and conclusions with respect to the qualifications of Farina and the merits of that application as compared with the application of Burlington Broadcasting. In an Opinion dated March 19, 1964, the Court of Appeals concluded that the Commission had failed to make or require adequate inquiry into the question of Farina's financial resources. Accordingly, the Court concluded: "We retain jurisdiction and remand for the development of a more adequate record."[2]

The Commission proceeded as ordered by the Court and the case was remanded to a Hearing Examiner on

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[1] *William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, et al.*, 34 F.C.C. 1135 (1963).

[2] *Halpern and Seltzer v. Federal Communications Commission*, 118 U.S. App. D.C. 28, 331 F.2d 774, *cert. den.* October 12, 1964 sub. nom. *Mount Holly-Burlington Broadcasting Company, Inc. v. Halpern and Seltzer and Federal Communications Commission*, No. 190, 379 U.S. 827.

May 1, 1964. On July 10, 1964, Farina advised the Commission that he was withdrawing from the further prosecution of the matter, claiming that one of his creditors had secured a Court Appointed Receiver, to take over the licensee corporation.[3] On July 16, 1964, the Receiver[4] requested Commission consent to the involuntary assignment to him of the construction permit. Several days later, the Receiver sought intervention in the proceedings before the Commission, claiming that he would either go forward to meet the issues pursuant to the Court's earlier remand and the proposed further hearing or that he would propose other appropriate action. The Commission authorized the Receiver to file a brief stating his position.

On September 15, 1964, a newly organized corporation, West Jersey Broadcasting Company (hereinafter referred to as "West Jersey"), which theretofore had not been a party to the proceeding and which had not in any fashion evinced any interest in the proceeding, tendered to the Commission an application for the facilities involved herein together with a request that the Commission waive its "cut-off" rules so as to permit consideration of its application in a comparative hearing with the application of Burlington Broadcasting and such other new applications as might be filed.

On September 18, 1964, the Receiver filed a brief with the Commission stating that he could not proceed under the remand issues inasmuch as Farina refused to testify voluntarily in any further hearing.

On December 10, 1964, the Commission filed a motion with the Court of Appeals for remand of the pro-

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[3] The permit granted to Farina had been assigned by him to Mount Holly-Burlington Broadcasting Co., Inc., a corporation controlled by Farina.

[4] The Receiver is not acting generally for the benefit of all creditors but only for the National State Bank of Elizabeth, Farina's largest creditor.

ceeding for the purpose of adopting as the Commission's supplemental decision a "Report and Recommendation" setting aside its earlier grant to Farina and granting the application of Burlington Broadcasting. The decision of the Commission proposing to grant the application of Burlington Broadcasting was based on explicit findings that it is the preferred applicant and fully capable of operating these facilities in the public interest, convenience and necessity. Further, the Commission proposed to dismiss the Farina application because of his failure to prosecute his application. Finally, the Commission proposed to deny the West Jersey "Petition for Waiver" and not to accept the West Jersey application.

The Receiver and West Jersey filed motions in the Court of Appeals for leave to intervene and oppositions to the Commission's motion to remand. The Court of Appeals, acting without the benefit of briefs or oral argument, rejected the disposition of this case proposed by the Commission and granted the relief requested by West Jersey and Receiver. The Court remanded the case to the Commission with direction to: (1) reopen the record; (2) accept the application of West Jersey Broadcasting Company and any other qualified applicant for the facilities here involved; (3) allow intervention by the Receiver; (4) hold new comparative proceedings to determine which applicant is best qualified to be awarded said facilities; and (5) grant the application for assignment to the Receiver.

A Petition for Rehearing was filed by the Commission urging that the Court reconsider and grant the motion for remand or in the alternative afford opportunity for the filing of briefs and the submission of argument. Burlington Broadcasting filed a Petition for Rehearing Or in the Alternative for Rehearing *en banc* urging that the Court grant the motion for remand filed by the Commission.

In separate Orders released May 7, 1965, a panel of the Court of Appeals, with Judge Wright dissenting, de-

nied the petitions for rehearing filed by the Commission and Burlington Broadcasting (Appendix B herein); and the Court, with Judges Fahy, Danaher and Wright dissenting, denied the petition for rehearing *en banc* filed by Burlington Broadcasting. (Appendix C herein.)

REASONS FOR GRANTING THE WRIT

In this case the Commission provided the Court with the full factual background leading to its proposed "Report and Recommendation," which supported its findings that Burlington Broadcasting was the preferred applicant. The Commission had also considered the suggestion of opening the proceedings to new applicants but decided, based upon an application of its rules which had repeatedly been affirmed by the Court of Appeals [5] that no justification for such action existed.

In denying the motion of the Commission for remand so that the Commission could adopt its proposed "Report and Recommendation" granting the application of Burlington Broadcasting, this Court departed from established standards of judicial review of agency action. The decision of the Court below is directly in conflict with the decisions of this Court which make clear that the manner in which the Commission regulates and conducts its procedures is a matter of agency discretion. [6]

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[5] *Saint Louis Amusement Co. v. FCC*, 104 U.S. App. D.C. 45, 259 F.2d 202, *cert. den.* 358 U.S. 894; *Ranger v. FCC*, 111 U.S. App. D.C. 44, 294 F.2d 240; *Century Broadcasting Corp. v. FCC*, 114 U.S. App. D.C. 59, 310 F.2d 864; *Plains Television Corp. v. FCC*, 108 U.S. App. D.C. 20, 278 F.2d 854; *Fort Harrison Telecasting Corp. v. FCC*, 111 U.S. App. D.C. 368, 297 F.2d 779; *KFAB Broadcasting Co. v. FCC*, 85 U.S. App. D.C. 160, 177 F.2d 40; *Telegraph Herald Co. v. Federal Radio Commission*, 62 App. D.C. 240, 66 F.2d 220.

[6] *Federal Communications Commission v. Taft B. Schreiber*, slip opinion Case No. 482, October Term 1964, Supreme Court of the United States, p. 9, decided May 24, 1965; *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, 333 (1945); *WJR, The Goodwill Stations v. Federal Communications Commission*, 337 U.S. 265, 272 (1949).

The Order of the Court was issued without opinion or explanation: That Order did, however, advert to " . . . requests for affirmative relief pursuant to Section 402(h) of the Communications Act of 1934, as amended . . .". Accordingly, it may be presumed that the Court predicated its decision on the view that the provisions of Section 402(h) conferred upon it original and plenary authority to take such action which the Court in the exercise of its discretion considered appropriate.[7] If indeed this is the basis for extraordinary action taken by the Court it is believed that this view is erroneous.[8] Section 402(h) reads as follows:

> "In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

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[7] Intervenor West Jersey Broadcasting Company urged this view in its "Opposition to Motion for Remand; Request for Affirmative Relief Pursuant to Section 402(h) of the Communications Act" filed December 23, 1964, in the Court of Appeals.

[8] The only other possible explanation is that the Court held the Commission's determination to be arbitrary and capricious, or at least without any basis in the record or warrant in law. However, the Court did not even write an opinion to explain its action. Surely if administrative agencies' decisions are not permitted to stand unless the grounds upon which the agency acted are "clearly disclosed and adequately sustained," (*Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94; *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168), a determination that an agency's action is arbitrary and capricious should at a minimum advise the agency of the respects in which it has erred.

This action does not, by its terms, purport to effect any change in the scope of judicial review or to vest in this Court original jurisdiction to decide whether any new applicants should be admitted to the proceeding under review: Rather this Section confers authority on the Court for the limited purpose of insuring that the Commission give proper effect to any order of reversal which the Court may enter.

Indeed, the position which is necessarily implicit in the Order of the Court in this case is contrary to the scope of judicial review provided in Section 402(g) of the Communications Act of 1934, as amended. That section, by incorporating the provisions of Section 10(e) of the Administrative Procedure Act, in effect, limits and circumscribes the authority of the Court to reverse and set aside agency action to specified instances where error was committed. The question presented is of fundamental importance in the administration of the Communications Act of 1934, as amended, since the decision of the Court in this case is necessarily based upon an interpretation of Section 402(h) which is squarely at odds with the explicit provisions of Section 402(g) of the Communications Act and established standards of judicial review.[9]

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[9] Related and similar questions are presented by the pending Petition for Certiorari in *Mid-Florida Television Corp. v. FCC* (Case No. 204), filed June 1, 1965.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 26, 1965

APPENDIX A

Filed in the United States Court of Appeals
March 17, 1965

Before: Wilbur K. Miller, Senior Circuit Judge, Burger and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of appellee's motion for remand for the issuance of appropriate orders adopting the Report and Recommendation of the Commission, released December 10, 1964, as its Supplemental Decision in this case, of the motions of West Jersey Broadcasting Company and John C. Giordano, Receiver of the assets of Mount Holly-Burlington Co., Inc., for leave to intervene for the purpose of opposing appellee's said motion, of appellants' opposition to the motions for leave to intervene, and of said movants' replies to the opposition, and

It appearing that said movants to intervene have lodged with the clerk their oppositions to appellee's motion to remand, and requests for affirmative relief pursuant to Section 402(h) of the Communications Act of 1934, as amended, and that appellants and appellee have lodged their replies to said oppositions, it is

ORDERED by the court that West Jersey Broadcasting Company, and John C. Giordano, Receiver of the assets of Mount Holly-Burlington Co., Inc., are allowed to intervene in this case, and the clerk is directed to file the aforesaid lodged pleadings herein, and upon consideration whereof, it is

FURTHER ORDERED by the court that appellee's motion for remand for the purposes indicated therein be denied, and the aforesaid intervenors' request for affirmative relief is granted, and it is

FURTHER ORDERED by the court that this case is remanded to the Federal Communications Commission with directions to: (1) reopen the record; (2) accept the application of West Jersey Broadcasting Company and any other qualified applicant for the facilities here involved; (3) allow intervention by the aforesaid receiver, and (4) hold new comparative proceedings to determine which applicant is best qualified to be awarded said facilities.

Per Curiam.

Dated: March 17, 1965

Circuit Judge Wright would grant appellee's motion to remand and deny the aforesaid motions for leave to intervene.

APPENDIX B

Filed in the United States Court of Appeals
May 28, 1965

Before: Miller, Senior Circuit Judge, Burger, and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of the petitions for rehearing filed by the Federal Communications Commission and William S. Halpern and Louis N. Seltzer d/b as Burlington Broadcasting Company, and of the oppositions filed thereto by John C. Giordano and West Jersey Broadcasting Company, it is

ORDERED by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam

Dated: May 28, 1965

Circuit Judge Wright would grant the petitions for rehearing.

APPENDIX C

Filed in the United States Court of Appeals
May 28, 1965

Before: Bazelon, Chief Judge, Fahy, Washington, Danaher, Burger, Wright, McGowan, Tamm, and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of the petition for rehearing *en banc* filed by William S. Halpern and Louis N. Seltzer d/b as Burlington Broadcasting Company, and of the oppositions filed thereto by John C. Giordano and West Jersey Broadcasting Company, it is

ORDERED by the court *en banc* that appellants' aforesaid petition is denied.

Dated: May 28, 1965

Circuit Judges Fahy, Danaher, and Wright would grant appellants' petition for rehearing *en banc*.

APPENDIX D

STATUTES INVOLVED

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 et seq.:

> Section 10(e): Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.:

> Section 402(g): At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

Section 402(h): In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR JOHN C. GIORDANO IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals, which are unreported, are set forth in the petition at pages 11, 12, and 13.

JURISDICTION

The basis for the jurisdiction of this Court is adequately stated in the petition (Pet. 2).

QUESTION PRESENTED

Whether the court of appeals, having formerly remanded a decision of the Federal Communications Commission on comparative broadcast applications for further hearing on the grantee's application, and retained jurisdiction, may — after refusal of the grantee to proceed — again remand the case to the Commission with directions to reopen the record, accept new competing applications, hold a new comparative hearing, and afford corollary relief.

STATUTE INVOLVED

Sections 402(g) and 402(h) of the Communications Act of 1934, 48 Stat. 1093, as amended, 47 U.S.C. 402(g) and 402(h), and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009 (e), are set forth in the petition at pages 15-16.

STATEMENT

On November 18, 1958, petitioner, William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, filed an application for a new standard broadcast station at Burlington, New Jersey. Mutually exclusive applications were subsequently filed by Burlington County Broadcasting Company, and John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company.

After a comparative hearing on the three applications, the Commission's Hearing Examiner issued an Initial Decision on May 2, 1962, granting the application of Burlington County Broadcasting Company. On appeal to the full Commission, the Commission granted the application of John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company on June 14, 1963, and denied the applications of

petitioner and of Burlington County Broadcasting Company;[1] the latter then dropped out of the proceeding.[2]

Farina assigned his construction permit, with Commission approval, to a corporation owned by him (except for single qualifying shares held by members of his family), and new broadcast station WJJZ began operating at Mount Holly, New Jersey, on December 13, 1963, under "program test authority" issued to the assignee.[3]

Respondent adopts petitioner's Statement (Pet. 3-6) with the exception of the first two paragraphs on page 3, and with the addition to the description of West Jersey Broadcasting Company's application at the first full paragraph on page 4 of the petition of the following: West Jersey proposes to take over the broadcast facilities of station WJJZ, and to reimburse the creditors of the insolvent permittee, Mount Holly-Burlington Broadcasting Co., Inc.[4]

ARGUMENT

The petition for certiorari does not present any special or important reasons for review of the decision of the court of appeals herein.

Petitioner alleges (1) that the order of the court of appeals conflicts with the decisions of this Court; and (2) that the order — if based upon Section 402(h) of the Communications Act of 1934, as amended — is an interpretation of Section 402(h) in conflict with Section 402(g) of the

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[1] *William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, et al.*, 34 F.C.C. 1135 (1963).

[2] "Motion for Remand to Federal Communications Commission" filed December 11, 1964 in the court of appeals, pp. 2-3.

[3] *Id.* at 3.

[4] *Id.* at 5.

Act, which incorporates the provisions of Section 10(e) of the Administrative Procedure Act. The alleged conflicts do not exist.

I.

Prior to 1952, Section 402(e) of the Communications Act limited the court of appeals in its review of decisions of the Federal Communications Commission in comparative broadcast cases to remanding such cases to the Commission in the event of reversal.[5] In the *Pottsville* case, on the other hand, this Court held in 1940 that the Commission could reopen the record in a remanded case, add new parties and applicants, add new issues, and compile a new record.[6] Thus, the Commission was able to vitiate the effect of a reversal by the court of appeals in a comparative broadcast case in the sense that a successful appellant-applicant was subject to the hazard, after reversal, of losing once again before the Commission in competition with new applicants.

In 1952, Section 402(h) was added to the Communications Act, depriving the Commission of its authority un-

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[5] "(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however*, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal." 48 Stat. 1093.

[6] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

der the *Pottsville* case by confining the Commission on remand of a case from the court of appeals to the record made prior to appeal.[7] At the same time, however, the 1952 amendments removed the limitation on the power of the court of appeals by providing in Section 402(h) that the court itself could order the Commission to reopen the record, add new issues, and add new parties in a remanded case.[8]

II.

Petitioner alleges a conflict between the order of the court of appeals herein and the decisions of this Court with respect to the authority of the Commission *(vis-a-vis* the court of appeals) in *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), and *WJR, The Goodwill Stations v. Federal Communications Commission*, 337 U.S. 265 (1949). Discus-

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[7] "(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined." 48 Stat. 1093, as amended, 47 U.S.C. 402(h).

[8] "Subsection (h) contains provisions which are intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the court in the absence of proceedings to review. The committee points out that under the language of this subsection the appellate court would have ample authority, either on its own motion or upon the petition of the Commission or any other litigant, to provide, either as a part of its original decree or supplementary thereto, that new parties and new issues may be introduced and a new record made after remand to the Commission. This authority stems from the phrase 'and unless otherwise ordered by the court'." Sen. Rep. No. 44, 82d Cong., 1st Sess., p. 12.

sion of these cases is unnecessary here; both were decided prior to 1952 and are completely inapposite for the purpose cited in the petition. The remaining case cited by petitioner in support of its allegation is *Federal Communications Commission v. Taft B. Schreiber*, ___ U.S. ___, 14 L.Ed. 383, 85 S.Ct. ___ (1965). This case also is completely inapposite; it involved the power of the Commission to compel an officer of a corporate producer-packager of television programs to produce certain data in an investigatory hearing. The case did not involve an adjudication between mutually exclusive applicants for broadcast facilities, and no appeal under Section 402 of the Communications Act was involved.

III.

There is no conflict, as alleged, between Sections 402 (g) and 402(h) of the Communications Act, which were adopted together in 1952 by Congress. It is clear that the review by the court of appeals of decisions of the Commission in Section 402 cases is governed by the provisions of Section 10(e) of the Administrative Procedure Act (incorporated by reference in Section 402(g) of the Communications Act) and by Section 402(h) of the Communications Act. There is nothing conflicting in the language of the two sections, and the petition does not demonstrate any conflict.

IV.

There is also language at page 7 of the petition which implies that the court of appeals may have resorted to some strange and esoteric interpretation of Section 402 (h). This is a completely gratuitous inference. The action of the court of appeals is completely compatible with the straight-forward meaning of Section 402(h): when the Court believes in the exercise of its judicial discretion that the facts of a particular case justify the addition of new parties and new issues, and the compiling of a new record, it may order the Commission to act appropri-

ately. While a successful appellant-applicant in a comparative hearing may be required to go through an additional hearing process before the Commission, the procedure does not invade the rights of such party any more than such procedure invaded his rights when a further hearing was held under the doctrine of the *Pottsville* case.

V.

Whenever the court of appeals orders the Commission to reopen the record and admit new parties and new issues, the order must be the product of the exercise of judicial discretion by the court of appeals on the unique facts of the particular case before it. It is submitted that this is not an area of review contemplated by Rule 19 of this Court. It is noted here, by way of example, that there has been no case before the Commission and the court of appeals reasonably similar or analogous to the instant case, and there is no reason to anticipate that there will be a similar set of facts involved in any subsequent cases.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 24, 1965

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September 25, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 500

William S. Halpern and Louis N. Seltzer, *d/b as* BURLINGTON BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WEST JERSEY BROADCASTING COMPANY,
and
JOHN C. GIORDANO,
Receiver of the Assets of Mount Holly-Burlington Broadcasting Co., Inc.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR WEST JERSEY BROADCASTING COMPANY IN OPPOSITION

OPINIONS BELOW

The original opinion of the Commission is reported at 34 F.C.C. 1135 (1963). The opinion of the court reversing and remanding for further proceedings, while retaining jurisdiction, is reported at 331 F.2d 774 (D.C. Cir., 1964), *cert. den.*, 379 U.S. 827 (No. 190, Oct. Term, 1964).

The Report and Recommendation of the Commission upon remand is not officially reported. It may be found, however, at 3 Pike & Fischer, Radio Regulation 2d, 863 (1964). The order of the court below denying the Commission's motion for a full remand and granting the motions of respondents West Jersey Broadcasting Company and John C. Giordano for affirmative relief is printed at pp. 11-12 of the petition for a writ of certiorari (Appendix A).

JURISDICTION

The order of the Court of Appeals remanding the case to the Commission and granting requests for affirmative relief was entered on March 17, 1965. Petitions for rehearing were denied by orders entered on May 28, 1965. The petition for a writ of certiorari was filed on August 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below acted within its express authority to control the scope of a reversed and remanded proceeding, under Section 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. 402(h), when it directed the Federal Communications Commission to admit new parties to a remanded proceeding in light of a default by one of the original parties.

STATUTE INVOLVED

The pertinent section of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*), *i.e.*, Section 402(h), 47 U.S.C. 402(h), is set out in the petition (p. 16, Appendix D).

STATEMENT

In a previous phase of these proceedings, the Court of Appeals for the District of Columbia Circuit heard and determined an appeal under Section 402(b) of the Com-

munications Act of 1934, as amended, 47 U.S.C. 402(b), from a decision by the Federal Communications Commission granting the application of John J. Farina, tr/as Mount Holly-Burlington Broadcasting Company (Farina) for a new standard broadcast station in Mount Holly, New Jersey and denying the mutually exclusive application of petitioner William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company (Halpern and Seltzer).[1] In a prehearing stipulation, the parties to the appeal had agreed that the following issues were presented for decision (J. App., p. 1):

> 1. Whether the Commission's findings and conclusions with respect to the financial qualifications of John J. Farina tr/as Mount Holly-Burlington Broadcasting Company and that applicant's representations relating thereto were supported by substantial evidence of record.
>
> 2. Whether the Commission's findings and conclusions with respect to the comparative merits of appellant and John J. Farina tr/as Mount Holly-Burlington Broadcasting Company were supported by substantial evidence of record.

The court, however, disposed only of the first issue stipulated. As to that issue, it found that "[t]he present record is inadequate for anyone to make valid conclusions." *William S. Halpern and Louis N. Seltzer d/b as Burlington Broadcasting Co. v. Federal Communications Commission*, 331 F.2d 774, 775 (D.C. Cir., 1964), *cert. den.*, 379 U.S. 827 (1964). Accordingly, it remanded "... for the development of a more adequate record ..." and specified the nature of the inquiry it required *(Ibid.)* It left the second issue set forth above undecided. However,

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[1] A third applicant, which had been preferred by the Hearing Examiner, failed to appeal and ceased thereafter to participate in the proceeding. See *Burlington Broadcasting Co.*, 34 F.C.C. 1135, 1148, 1191-1204 (1963).

in its Judgment of March 19, 1964, the court retained jurisdiction ". . . to dispose of the case when the record is returned following the proceedings on remand."

No stay pending appeal had been sought by petitioner. With Commission approval, Farina assigned his permit to a corporation owned and controlled by him, constructed his station and, on December 11, 1963, commenced operation.

Upon remand, the Commission designated the case for further hearing. However, in July, 1964, Farina informed the Commission that the assets of his company had been depleted by the proceedings herein, that a receiver had been appointed to conserve assets, and that, subject to the rights of his creditors, he would not prosecute the matter further. Also in July, the court-appointed receiver (respondent Giordano herein) filed an application with the Commission for the involuntary transfer of Farina's permit to him and sought the Commission's leave to intervene in the proceeding.

In September, 1964, the receiver informed the Commission that Farina had refused to testify voluntarily in the further proceedings. In the same month, respondent West Jersey Broadcasting Company (West Jersey) tendered an application for the facilities which had been authorized to Farina, requested the Commission to waive the lateness of this filing under its Rules, and urged the Commission to seek permission from the Court of Appeals to reopen the record for consideration of this new application.[2] This was also the course favored by respondent Giordano.

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[2] Respondent urged that in light of the comparative weakness of the Halpern and Seltzer application, the equities of innocent station employees and creditors and the public interest in continuing a meritorious service from a station located in Mount Holly (the Halpern and Seltzer proposal was for a station in Burlington rather than Mount Holly), Farina's default should not preclude consideration of alternatives to the Halpern and Seltzer application.

After further pleadings, on December 10, 1964, the Commission issued a Report and Recommendation to the court. In view of Farina's default, the Commission proposed to set aside its previous grant. Repeatedly stressing the equities accruing to Halpern and Seltzer because of their pursuit of a license for "nearly six years," the Commission rejected West Jersey's request. Instead, it proposed to grant petitioner's application. *Burlington Broadcasting Co.*, 3 Pike & Fischer, Radio Regulation 2d, 863, 870-71 (1964). [3]

Pursuant to this Report and Recommendation, the Commission filed a motion with the court below requesting a full remand of the pending appeal to permit issuance of a final decision carrying out the proposals it had made. Respondents West Jersey and Giordano sought leave to intervene in the pending appeal and lodged with the court pleadings which both opposed the Commission's motion for remand and requested affirmative relief pursuant to Section 402(h) of the Communications Act, 47 U.S.C. 402 (h). West Jersey sought a remand with directions that the Commission entertain new applications and hold comparative proceedings to determine which applicant should be granted the facilities involved. Respondent Giordano asked for the same relief and, in addition, for an order directing the Commission to grant the receiver's application for consent to the involuntary assignment of the Farina construction permit to him.

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[3] The Commission proposed to dismiss as moot receiver Giordano's application for involuntary assignment of the Farina permit to him. However, it authorized the receiver to continue operating the station involved ". . . pending the court's action with respect to this Report and Recommendation." It stated further that, assuming the court approved its proposed disposition and ". . . in light of whatever decision Halpern and Seltzer may reach on the question of a taking-over of the Mount Holly facility . . . ," it would ". . . consider further requests with respect to a continuity of service on the frequency." *Burlington Broadcasting Co.*, 3 Pike & Fischer, Radio Regulation 2d, 863, 871-72 (1964).

On March 17, 1965, a panel of the Court of Appeals, one judge dissenting, issued an order which granted respondents' motions to intervene, denied the Commission's motion for remand, granted respondents' motions for affirmative relief under Section 402(h) and remanded the case to the Commission ". . . with directions to: (1) reopen the record; (2) accept the application of West Jersey Broadcasting Company and any other qualified applicant for the facilities here involved; (3) allow intervention by the aforesaid receiver, and (4) hold new comparative proceedings to determine which applicant is best qualified to be awarded said facilities." See Pet., p. 12 (Appendix A).[4]

A petition for rehearing *en banc* filed by Halpern and Seltzer was denied on May 28, 1965, three judges dissenting. Petitions for rehearing addressed to the panel which had issued the order in question, filed by the Commission and by Halpern and Seltzer, were denied on the same day, one judge dissenting.

ARGUMENT

1. None of the grounds for the grant of a writ of certiorari which are specified in Rule 19 of the Rules of this Court is present here. The primary ground advanced by petitioner is an asserted conflict between the action below and decisions of this Court which hold that Congress has generally committed the procedure to be followed in the grant or denial of radio licenses to the discretion of

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[4] Petitioner states that the Court of Appeals also directed the Commission to grant the application for assignment to the receiver. (Pet., p. 5.) The only possible ground for this statement is the fact that the court granted the receiver's request for affirmative relief. Since, however, the court below proceeded to spell out the respects in which it was granting affirmative relief, omitting any such direction to the Commission, petitioner's statement is without foundation.

the Commission.[5] The court below acted, however, under the special provisions of Section 402(h) of the Act, which impose upon it the duty of controlling the scope of Commission proceedings following a reversal and remand. The decisions on which petitioner relies do not reach the only issue presented here, *viz.*, the proper exercise by a reviewing court of its duties under these provisions. They deal rather with the general standards for review of Commission actions which take place prior to any judicial examination — much less reversal and remand.[6] Thus, the asserted conflict does not exist. Nor is there any other reason for further review by this Court.

2. The action below was explicitly grounded upon Section 402(h) of the Act, which provides that, where the

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[5] See Pet., p. 6, fn. 6, citing *Federal Communications Commission v. Taft B. Schreiber*, 381 U.S. 279, 289 (1965); *Federal Communications Commission v. WJR, the Goodwill Station, Inc. et al.*, 337 U.S. 265, 272 (1949); *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, 333 (1945).

[6] *Schreiber* deals with the review by a Federal district court, upon application for enforcement of a Commission subpoena, of Commission decisions whether to treat particular testimony and evidence in a broad, quasi-legislative investigation as confidential. *WJR*, at the page cited, deals with the review by a Court of Appeals of the Commission's decision whether to postpone action on a particular application pending resolution of a potentially related rulemaking proceeding; in addition, *WJR* treats the Commission's discretion in deciding whether to hear oral argument on a petition alleging that the grant of an application will, because of the electronic interference thus caused, affect the license rights of an existing station (337 U.S. at 274-85). *Ashbacker* deals with the question of whether the Communications Act requires the Commission to give co-pending mutually exclusive applications a contemporaneous and comparative hearing. At the page cited by petitioner, a footnote suggests that the Commission has the discretion to establish by rule filing dates which determine whether one application is to be considered together with another, previously filed and mutually exclusive application (326 U.S. at 333, fn. 9).

reviewing court reverses and remands, the Commission must restrict its attention to the existing record "...unless otherwise ordered by the court. . . .".[7] This provision was inserted into the Act by the Congress for the express purpose of revising the rule previously enunciated in *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940). In *Pottsville*, this Court stated generally that Commission procedures were a matter of Commission discretion (309 U.S. at 138). On this basis, it held that the Court of Appeals for the District of Columbia lacked power to prevent the Commission from reopening the record to consider new applicants, after the agency's prior decision had — as here — been reversed and remanded for further proceedings (309 U.S. at 145).

The Court further held that no right of priority for earlier filed applications could be inferred from "...the curtailed review allowed by the Communications Act..." (309 U.S. at 145). For "[s]uch an implication ... is at war with the basic policy underlying the statute," which makes "... the public interest..." rather than "... the contingencies of judicial review and litigation..." decisive in the granting of applications (309 U.S. at 145-46).

Section 402(h) was a direct response to the *Pottsville* decision.[8] The Congress did not create any right of pri-

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[7] Petitioner suggests some doubt whether the Court of Appeals in fact purported to act under Section 402(h) (Pet., p. 7). As the Statement above notes, however, the court not only "adverted" to the ". . . requests for affirmative relief pursuant to Section 402(h). . ." filed by respondents West Jersey and Giordano (intervenors below) but explicitly granted ". . . the aforesaid intervenors' request for affirmative relief. . . ." See the order of March 17, 1965, Pet., p. 11 (Appendix A).

[8] Section 402(h) stems from the Communications Act, Amendments, 1952, § 14, 66 Stat. 720 (1952). Like many other provisions of those amendments, however, it originated in H.R. 5497, 77th Cong. (1942). See H. Rep. No. 1750, 82d Cong., 2d Sess., p. 1 (1952). The section was explicitly proposed as a

(*continued on following page*)

ority for earlier filed applications, as against others tendered after a reversal and remand. It decided, rather that when a finding of agency error is made, the reviewing court (instead of the agency) should determine the scope of the remanded proceeding. As the Senate Committee reporting on the relevant bill remarked (Sen Rep. No. 44, 82d Cong., 1st Sess., p. 12 (1951)):

> Subsection (h) contains provisions which are intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the court in the absence of proceedings to review. *The committee points out that under the language of this subsection the appellate court would have ample authority either on its own motion or upon the petition of the Commission or any other litigant, to provide, either as part of its original decree or supplementary thereto, that new parties and new issues may be introduced and a new record made after remand to the Commission.* This authority stems from the phrase "and unless otherwise ordered by the court." (Emphasis added.)

The present case falls squarely within Section 402(h). There was an appeal from a Commission decision, a finding of error and a remand to the agency. Events

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(*footnote* 8 *continued from preceding page*)
means of overturning the *Pottsville* decision, and was opposed by the Commission on the ground that *Pottsville* represented sound policy. See Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess. on H.R. 5497, pp. 88-90, 816-19, 959-61 (1942). For the subsequent history of this provision, see, *inter alia*, Hearings before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. on S. 814, pp. 946-47 (1943); Hearings before a Subcommittee on the Senate Committee on Interstate and Foreign Commerce, 80th Cong., 2d Sess. on S. 1333, pp. 67, 87 (1947); Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. on S. 658, pp. 103-04, 282, 359 (1951); Sen. Rep. No. 44, 82d Cong., 1st Sess., p. 12 (1951); H. Rep. No. 1750, 82d Cong., 2d Sess., p. 17 (1952).

flowing from the reversal and remand persuaded the court below, upon the petitions of litigants in the case, that the record should be reopened for consideration of new applicants. The court's order was within the letter and the spirit of the statute. It did not, therefore, invade any province reserved to the Commission's discretion. Nor did it conflict with the decisions on which petitioner relies, which — insofar as they are material here — merely follow the general rule concerning agency discretion announced in *Pottsville*.[9]

3. No other ground for review is argued by petitioner,[10] and none exists. The correctness of the court's exercise of its jurisdiction under Section 402(h) presents no issue for review. The general policy of the Act remains as it was declared to be in *Pottsville*. The public interest, rather than the contingencies of litigation, must be the decisive factor in determining which of several applications is to be granted. Petitioner makes no claim that the court below reached an incorrect result under this policy.

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[9] See *Federal Communication Commission v. Taft B. Schreiber*, 381 U.S. 279, 289-91 (1965); *Federal Communications Commission v. WJR, The Goodwill Station, Inc. et al.*, 337 U.S. 265. 272, 283 (1949).

[10] Petitioner does claim that the court's action was contrary to Section 402(g) of the Act, 47 U.S.C. 402(g) (Pet., p. 8). But this section, which makes the standards for review of administrative action embodied in Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e), applicable to the hearing and determination of appeals from licensing actions of the Commission, adds nothing to petitioner's case. The standards of review to which Section 402(g) refers are defined and explained, insofar as review of the actions of the Commission is concerned, by the decisions of this Court on which petitioner relies. Since those decisions are not applicable to the action below, the standards they define are likewise inapplicable. The court below was not engaged in the hearing and determination of an appeal pursuant to Section 402(g). Rather, having heard and partially determined an appeal, it was disposing of ancillary motions under the explicit provisions of Section 402(h).

4. The factual and jurisdictional setting in which the order below was issued is so specialized as to be virtually unique. The instances in which a broadcast applicant is successful in obtaining a grant and then defaults after a reversal and remand are indeed few. This case is limited further by reason of the fact that the order of which petitioner complains came at a point when the appellate process was incomplete. Having determined only one of the two issues presented to it by petitioner's appeal, the court — as we have noted — retained jurisdiction notwithstanding its remand. Because of this retention of jurisdiction, the Commission did not think it appropriate to issue a final and effective decision upon remand. Instead, it issued a Report and Recommendation to the court, and moved for a full remand to permit the issuance of a final decision. The Court of Appeals was thus faced both with the question of the appropriate scope of proceedings in a case which had been reversed and remanded and with the question of whether an appeal still pending before it should be remanded to the agency in light of after-occurring events. *Cf. Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364 (1939); *Fleming v. Federal Communications Commission*, 225 F.2d 523 (D.C. Cir., 1957). In these circumstances, the considerations appropriate to its action and the nature of the action it could take were of a highly special and rarely recurring kind.

Petitioner suggests that related questions are presented by the pending petition for certiorari in *Mid-Florida Television Corp. v. Federal Communications Commission* (No. 204), filed June 1, 1965 (Pet., p. 8, fn. 9). In addition, the petitioner in *Florida - Georgia Television Co., Inc. v. Federal Communications Commission* (No. 590), filed September 20, 1965, has suggested that the action below in this proceeding may rest on a belief by the court that Section 402(h) grants "... a new statutory authority to exercise a policy supervision over the Commission," that such a view may form the basis

of the court's action in *Florida - Georgia* and that — if this avowed "speculation" is correct — the two cases are related *(Florida - Georgia* Pet. pp. 18-22).

There is, to be sure, one common factor in the three proceedings.[11] In both *Mid-Florida* and *Florida - Georgia* the court below has directed the Commission to reopen broadcast licensing proceedings for the consideration of new applications, as it has done here. In neither *Mid-Florida* nor *Florida - Georgia*, however, was there a reversal of an agency decision because of an error independent of the failure to reopen and a remand (coupled with retention of jurisdiction), followed by events which persuaded the court, upon motions by litigants, that new applications should be considered. Neither, in brief, involves the fundamental problem at which Section 402(h) is aimed, *i.e.*, the proper scope of a licensing proceeding when there has been a reversal and remand.[12] Nor

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[11] The similarity urged by the petitioner in *Florida - Georgia*, however, *i.e.*, that in all three cases the court below has exceeded its proper jurisdiction on review, might be urged of any petitions seeking review of actions by the court below in the course of, or ancillary to, a review of Commission actions.

[12] Both *Mid-Florida* and *Florida - Georgia* do involve, on the other hand, a question wholly absent in this case, *i.e.*, the action required of the Commission and the role of the reviewing court in cleansing a licensing proceeding of the taint injected by improper *ex parte* approaches to members of the agency. Such attacks upon the integrity of the agency's judgments necessarily bring into play extraordinary jurisdictional and procedural rules. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-50 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (3d Cir., 1948), *cert. den.*, 335 U.S. 912 (1949); *Massachusetts Bay Telecasters, Inc. v. Federal Communications Commission*, 261 F.2d 55 (D.C. Cir., 1958), *cert. den.*, 366 U.S. 918 (1961), 295 F.2d 131 (D.C. Cir., 1961); *WKAT, Inc. v. Federal Communications Commission*, 296 F.2d 375 (D.C. Cir., 1961), *cert. den.* 368 U.S. 841 (1961); and see this Court's order of October 27, 1958 in the *Mid-Florida* proceeding, which takes the extraor-

(continued on following page)

does either involve the question of whether a case should be remanded to an agency in light of events occurring subsequent to the filing of an appeal. *Cf., Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364. Thus, neither the problem with which the Court of Appeals dealt here nor the jurisdictional and procedural ambit in which it moved bears more than a superficial resemblance to those involved in *Mid-Florida* and *Florida - Georgia*.[13]

(*footnote* 12 *continued from preceding page*)
dinary action of vacating on the Court's own motion a prior judgment of the Court of Appeals affirming the Commission, and remanding for consideration in light of testimony before a Congressional committee which suggested that improper conduct had occurred (reported *sub nom., WORZ, Inc. v. Federal Communications Commission*, 358 U.S. 55 (1958)).

[13] The petitioner in *Florida - Georgia*, having assumed the relevance of the order in this proceeding to its case, urges that Section 402(h) cannot be construed to authorize the action below without conferring upon the reviewing court the power to make "administrative decisions," thus raising questions of "constitutional magnitude" or, in any event, questions of this Court's power to review, under the rule of *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930) and like cases. (Florida - Georgia Pet., pp. 20-21.) This attempt to raise constitutional issues rests on the abstract premise that any addition whatever to the pure function of laying bare errors of law in agency decisions must necessarily constitute an "administrative function," inappropriate for a constitutional court. But an order requiring the Commission to consider a competing application can hardly be "administrative," in light of this Court's imposition of just such a requirement in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327 (1945). In any event, the limited ancillary order issued here, controlling the scope of a proceeding which had been reversed and remanded, is no more "administrative" than an order staying the effectiveness of a Commission action pending appeal (*Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4 (1942)) or an order remanding without deciding the merits of an appeal ". . . where justice demands that course in order that some defect in the record may be supplied." *Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 373

(*continued on following page*)

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 25, 1965

(*footnote* 13 *continued from preceding page*)
(1939). Indeed, as we have noted, the court below, in disposing of the Commission's motion for a full remand, was deciding under the doctrine of *Ford* whether justice demanded a remand on the terms requested by the Commission. Its order, like the order affirmed in *Ford*, did not seek to control the results of an agency's exercise of discretion. Rather, like the order affirmed in *Ford*, it directed the agency's attention to a matter upon which it was to exercise its discretion. The order below, therefore, ". . . does not encroach upon administrative functions." (305 U.S. at 374.)

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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STATUTE

Communications Act of 1934, 47 U.S.C. 402(h) . . . . . *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 500

William S. Halpern and Louis N. Seltzer, d/b as
BURLINGTON BROADCASTING COMPANY,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The briefs for Respondents in opposition put into clear focus the nature and importance of the principal question presented in the Petition for *Certiorari*: The proper interpretation of Section 402(h) of the Communications Act of 1934, 47 U.S.C. 402(h). For, it is conceded by Respondents that the decision of the court below is in conflict with earlier decisions of this court, such as the recent decision in *FCC v. Schreiber*, 381 U.S. 279, 14 L.ed. 383, which reaffirmed the established principle that courts of law will not interfere with procedural matters which are entrusted to the discretion of administrative agencies.

Respondents assert, however, that the decision of the court below was grounded upon Section 402(h) and that the Court of Appeals merely exercised the power, granted by that section, to control the scope of the Commission's procedures. The Respondents are evidently not in agreement, however, with respect to the type of case or the circumstances in which this power may be exercised. In this reply we deal first with the delineation of the character of the power Respondents assert has been granted the Court of Appeals under Section 402(h) and then with the question as to when that power may be exercised.

Petitioner and Respondents are agreed that Section 402(h), enacted in 1952, was intended to modify the decision of this Court in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). The question in *Pottsville* was whether the Circuit Court of Appeals, upon setting aside (for error of law) the Commission's denial of an application to construct a radio station, could upon remanding the application to the Commission, require the Commission to consider the application on the basis of the record as originally made instead of considering it together with subsequently filed rival applications. Answering in the negative, this Court emphasized that the supervisory functions of the Court of Appeals are purely judicial. In its opinion, this Court stressed that the decision whether the grant of a broadcasting license would serve the public convenience and necessity had been entrusted by the Congress to the Commission; and that the subordinate questions of the procedures to be followed in ascertaining the public interest — questions such as "the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions — were explicitly and by implication left to the Commission's own devising, so long, of course, as it observed the basic requirements designed for the protection of private as well as public interest," *Id.* at 138. Further, this court

stated: "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Id.* at 145. To the argument that such re-opening of the record would result in delay and hardship and might deprive the original applicants of priority rights, as against later applicants, this Court answered that Congress had not conferred such priorities and that a Congressional remedy was available. *Id.* at 145, 146.

Section 402(h) unquestionably modified the holding of *Pottsville*. The issue presented here is how extensive a modification was made. Section 402(h) provides:

> "In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

There is no disagreement that as a result of this amendment the Commission is no longer free, following a reversal and remand by the Court of Appeals, to reopen the record without authorization by the court, either for the taking of additional evidence or for the consideration of new applications for the same or a mutually exclusive facility. The primary purpose of 402(h) was to secure the fruits of victory to the appellant who succeeded in upsetting the denial of his application or a grant to a competitor.

There is disagreement, however, about the meaning of the phrase "unless otherwise ordered by the court." Petitioner's view is that this phrase was not designed to modify the traditional standard of judicial review, namely,

whether the agency's action was arbitrary or capricious. Rather, the only function of the phrase was to take into account the fact that a literal reading of the section, without this qualification, would have led to the incongruous result that, where the Commission had acted arbitrarily in refusing to consider an application or in excluding evidence, upon reversal and remand the Commission would still be bound to act "upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

Respondents, on the other hand, assert that under the "unless otherwise ordered" provision the Court of Appeals was vested with broad power to "determine the scope of the remanded proceeding" (West Jersey Br. p. 10) and that it can do so without soliciting or considering the Commission's views. This, of course, would be a marked departure from the traditional rule which requires the court to give effect to the Commission's determination with respect to the desirability of entertaining new applications or hearing new evidence unless its ruling is found to be arbitrary or unreasonable.

The only standards which Respondents suggest should be applied by the court in making this determination are whether the court regards its decision as being in the "public interest" (West Jersey Br. p. 9) and whether the decision is a "product of the exercise of judicial discretion" (Giordano Br. p. 7). Whether these particular standards are employed or some other equivalent formulation — e.g., whether the court believes its decision rather than the Commission's will best serve the public convenience and necessity — it is clear that, once the type of review regulated by the "arbitrary and capricious" rule is abandoned, the only other rule can be whether the court thinks its decision preferable to that of the Commission.[1]

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[1] In the Court below West Jersey urged that its request was "... directed to the exercise of the Court's original jurisdic-

(*Continued, next page*)

The import of such a reading of Section 402(h) in terms of the type of authority conferred upon the Court is well illustrated in this case. For, in this case the Court summarily rejected the Commission's considered judgment on the disposition of a proceeding which had been pending before it for more than six years. The Court did so without the benefit of oral argument; it did not render any opinion, but rather issued a peremptory order only, which was devoid of any determination that the Commission erred in any respect. Proceeding in this fashion, the Court directed the Commission (1) to reopen the record, (2) to accept the late application of West Jersey and of any other qualified applicants, (3) to allow intervention by receiver Giordano, (4) to hold new comparative proceedings to determine the best qualified applicant, and (5) to grant the application for assignment to Giordano.[2]

(Footnote 1, continued)
tion and is not in the nature of an appeal from a final order wherein this Court is obligated to defer to the Commission's expertise and discretion. The normal standard of review applied by this Court to Commission action is not here involved. The relief sought pursuant to Section 402(h) is directed to this Court's original and not its reviewing authority." (Opposition to Motion for Remand pp. 5-6, filed December 23, 1964.)

[2] West Jersey questions whether the Order of the Court directed grant of the application for assignment to Giordano (West Jersey Brief p. 6, f.n. 4). The short answer is (1) the Court's Order which explicitly granted Giordano's request for affirmative relief; and (2) the Commission itself so construed the Court Order. In its Petition for Rehearing filed April 1, 1965, the Commission stated (p. 3):

> "In granting the affirmative relief requested by the intervenor it appears that the Court's order has directed the Commission to grant the pending application of John C. Giordano for consent to the assignment to him of the construction permit of Station WJJZ. (See 'Opposition to Motion for Remand and Request for Affirmative Relief' filed December 23, 1964 by John C. Giordano, Receiver of the assets of Mount Holly-Burlington Broadcasting Co., Inc., p. 11; and the Order of March 17, 1965 granting 'intervenor's request for affirmative relief.') This action, if intended, is we believe unprecedented and runs clearly counter to the repeated assertions of this Court that the grant or denial of an application involves determinations which the Commission alone may make."

It is self evident that such determinations are administrative and not judicial. Thus, it was not urged on the Court below that the Commission erred, or that it had been arbitrary in its proposed disposition of this case: Rather it was contended that the Court of Appeals was invested with original jurisdiction to exercise its discretion in preference to that of the Commission. As Respondent West Jersey points out (p. 4, f.n.2), the considerations urged by it in support of its request that the court order the Commission to entertain its application were "the comparative weakness of the Halpern and Seltzer application, the equities of innocent station employees and creditors and the public interest in continuing a meritorious service from a station located in Mount Holly." Certainly the determination of such questions has traditionally been made by the agency, and not by the court.

The only case of which we know in which a similar — indeed, we think indistinguishable — delegation of power was involved is *Radio Commission v. General Electric Co.*, 281 U.S. 464. There, the Court of Appeals for the District of Columbia was given power, in reviewing a decision of the Radio Commission, to take additional evidence if it thought it proper and to "alter or revise the decision appealed from and enter such judgment as to it may seem just." *Id.* at 467. This Court held that in exercising this power the Court of Appeals was not acting as an Article III court but rather simply as an administrative agency. Further, this Court recognized that the separation of powers inherent in our Constitution prevented the delegation and exercise of similar powers by courts provided for under Article III of the Constitution. "But," said the Supreme Court, "this court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only . . . nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative." *Id.* at 469.

Having amended the statute in order to eliminate this problem, see *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 275, it would indeed be extraordinary if the Congress had reintroduced it in 1952 in enacting 402(h). At any rate, the issue whether the Respondents' reading of Section 402(h) is correct — involving as it does the questions whether the Congress intended to treat the Federal Communications Commission in this unique fashion, whether this Court has appellate jurisdiction and whether such authority may constitutionally be conferred upon the Court of Appeals, see *Glidden Co. v. Zdanok*, 370 U.S. 530, 580 — deserves prompt resolution by this Court.

Respondents contend that grant of the Petition for *Certiorari* is not warranted for the asserted reason that the circumstances involved herein are unique. Thus, Giordano asserts that "... there is no reason to anticipate that there will be a similar set of facts involved in any subsequent cases." (Br. p. 10); and West Jersey contends that the "factual and jurisdictional setting in which the Order below was issued is so specialized as to be virtually unique." (Br. p. 11.) The criteria which Respondents have urged as to when the statute is applicable does not, however, support that conclusion. Thus, Giordano asserts that under Section 402(h) "When the Court believes in the exercise of its judicial discretion that the facts of a particular case justify the addition of new parties and new issues and the compiling of a new record, it may order the Commission to act appropriately" (Br. p. 6). Clearly, tested by this recommended standard, there is literally no situation in which the Court of Appeals could not exercise the power Respondents assert has been granted under Section 402(h).[3]

[3] During the past year 53 appeals from F.C.C. decisions were filed in the Court of Appeals for the District of Columbia.

West Jersey purports to advance a more limited standard in an attempt to confine the scope of the exercise of such power. West Jersey asserts that the power of the Court under 402(h) comes into play only where the Court finds some independent error by the agency, unrelated to the scope of the agency proceeding. That is, the court could not decide on other than the traditional grounds whether the Commission has erred in failing to entertain an application or consider certain evidence. However, once it decides that the Commission has committed some error of law, then the Court is free to exercise its power under section 402(h) to order the Commission on remand to admit new parties or to accept new evidence. Thus, in the case at bar the error which, according to West Jersey, authorized the court to "determine the scope of the remanded proceeding" related solely to the lawfulness of the grant to the originally successful applicant. At no point in the litigation did anyone assert that the Commission had acted arbitrarily in not opening the proceeding to new applications after the originally successful applicant informed that Commission that it was withdrawing. Yet, the Court, having reversed the Commission on other grounds, directed the Commission to consider West Jersey's application on remand.

To be sure, this interpretation of 402(h), which requires a finding of independent error before the Court may exercise its power to direct the scope of remand is not as broad an interpretation as that urged by respondent Giordano. But it can hardly be asserted that under the West Jersey interpretation it would be a "unique" case in which the Court's 402(h) power could be employed, for it could be employed in every case in which the Court finds an error of law by the Commission. Thus the importance of the issue in terms of the definition of the Court's power is in no way mitigated

by the circumstances under which that power may be exercised.[4]

The question of statutory construction presented by this case thus has two aspects. First does Section 402 (h) confer upon the Court of Appeals a function significantly different in character from that exercised by courts of appeals when reviewing the decisions of other administrative agencies? Second, it it does, what are the circumstances under which this power may be exercised? A prompt and authoritative determination of these questions is of evident importance to the administration of the Communications Act. We respectfully submit that the petition for *certiorari* should be granted.

Respectfully submitted,

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[4] West Jersey suggests that the case is unusual because of its particular facts (Br. p. 11). While this might be relevant if the question were whether the decision of the court was correct assuming it had the power to make the decision at all, it is entirely irrelevant when what is at stake is the existence of the power. As we have indicated, the only facts material to that question, under West Jersey's reading of the statute, are that the Commission committed an error of law requiring a remand, which thereupon brought into play the court's section 402(h) power to decide for itself the scope of the remanded proceeding.